

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JACK HAYEK,

Plaintiff,

v.

HCAL, LLC, HARRAH'S OPERATING  
COMPANY, INC., RINCON BAND OF  
LUISENO INDIANS,

Defendants.

Civil No. 11cv608 L (BLM)

**ORDER GRANTING MOTION TO  
DISMISS [doc. #3] and GRANTING  
PLAINTIFF LEAVE TO AMEND**

Defendant HCAL, LLC and specially appearing defendant Harrah's Operating Company, Inc. ("HOC") move to dismiss the complaint. The motion has been fully briefed and is submitted without oral argument pursuant to Civil Local Rule 7.1(d)(1).

**I. Background**

Plaintiff Jack Hayek was employed by HCAL, LLC to work at Harrah's Rincon Casino & Resort in Valley Center, California. The Rincon Casino is located on the Rincon San Luiseno Band of Mission Indians Reservation. Hayek contends that his employment was constructively terminated because of his age and medical disability when HCAL refused to make reasonable accommodations for him.

On September 27, 2010, plaintiff filed a complaint with the California Department of Fair Employment and Housing alleging age and disability discrimination and wrongful discharge. He

1 received a Right to Sue Letter. In addition, plaintiff filed a Request for Tribal Council Action;  
 2 however, no action was taken. Although Hayek asserts that his administrative remedies have  
 3 been exhausted, he does not allege that he has exhausted his federal Americans with Disabilities  
 4 claim.

5 Hayek originally filed this action in Superior Court for the State of California, County of  
 6 San Diego. Defendants removed the action based on the Court's diversity jurisdiction. 28 U.S.C.  
 7 § 1332(a).

8 Defendant HOC moves to dismiss the complaint contending that the Court lacks personal  
 9 jurisdiction over it under Federal Rule of Civil Procedure 12(b)(2), and defendants also seek  
 10 dismissal of the entire complaint under Federal Rule of Civil Procedure 12(b)(6).

## 11 **II. Discussion**

### 12 **A. Personal Jurisdiction**

13 Defendant HOC, a Delaware corporation with its principal place of business in Las  
 14 Vegas, Nevada., moves to dismiss the complaint for lack of personal jurisdiction under Federal  
 15 Rule of Civil Procedure 12(b)(2). Plaintiff bears the burden of establishing that jurisdiction is  
 16 proper. *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 2011 WL 3437047, \*2 (9th Cir., Aug. 8,  
 17 2011.) If the defendant's motion is based on written materials rather than an evidentiary hearing,  
 18 the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion  
 19 to dismiss. *Id.* (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th  
 20 Cir. 2010). "The plaintiff cannot 'simply rest on the bare allegations of its complaint,' but  
 21 uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger v. Fred*  
 22 *Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (quoting *Amba Mktg. Sys., Inc. v. Jobar*  
 23 *Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)). The court "may not assume the truth of allegations  
 24 in a pleading which are contradicted by affidavit," *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*,  
 25 557 F.2d 1280, 1284 (9th Cir. 1977), but must resolve "factual disputes in the plaintiff's favor."  
 26 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006).

27 The district court applies the law of the state in which the court sits when no federal  
 28 statute authorizes personal jurisdiction. FED. R. CIV. P. 4(k)(1)(A); *Panavision Int'l, L.P. v.*

1 *Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). California's long-arm statute, Civil Procedure  
 2 Code § 410.10, is coextensive with federal due process requirements; therefore, the jurisdictional  
 3 analyses under state law and federal due process are the same. *Schwarzenegger*, 374 F.3d at  
 4 800–01.

5 For a court to exercise personal jurisdiction over a nonresident defendant consistent with  
 6 due process, that defendant must have "certain minimum contacts" with the relevant forum "such  
 7 that the maintenance of the suit does not offend 'traditional notions of fair play and substantial  
 8 justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v.*  
 9 *Meyer*, 311 U.S. 457, 463 (1940)). Under a due process analysis, a defendant may be subject to  
 10 either general or specific personal jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v.*  
 11 *Hall*, 466 U.S. 408, 414 (1984).

## 12 **1. General Jurisdiction**

13 "For general jurisdiction to exist over a nonresident defendant . . . the defendant must  
 14 engage in continuous and systematic general business contacts, that approximate physical  
 15 presence in the forum state." *Schwartzenegeger*, 374 F.3d at 801 (internal quotations omitted).  
 16 "This is an exacting standard, as it should be, because a finding of general jurisdiction permits a  
 17 defendant to be haled into court in the forum state to answer for any of its activities anywhere in  
 18 the world." *Id.*

19 It is clear that general jurisdiction is not applicable here. It is uncontroverted that  
 20 defendant HOC does not operate any businesses in California, does not own, manage, control, or  
 21 supervise the casino where plaintiff alleges he was subjected to discrimination. As a result, HOC  
 22 does not have contacts with the forum state – California – that are substantial, continuous and  
 23 systematic. Accordingly, the Court cannot exercise personal jurisdiction over HOC under a  
 24 theory of general jurisdiction.

## 25 **2. Specific Jurisdiction**

26 A court exercises specific personal jurisdiction over a defendant where the claim arises  
 27 out of or has a substantial connection to the defendant's contact with the forum. *Glencore Grain*  
 28 *Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002). The Ninth

1 Circuit analyzes specific jurisdiction according to a three-prong test: (1) the non-resident  
 2 defendant must purposefully direct his activities or consummate some transaction with the forum  
 3 or resident thereof; or perform some act by which he purposefully avails himself of the privilege  
 4 of conducting activities in the forum, thereby invoking the benefits and protections of its laws;  
 5 (2) the claim must be one which arises out of or relates to the defendant's forum-related  
 6 activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice,  
 7 *i.e.*, it must be reasonable. *Menken v. Emm*, 503 F.3d 1050, 1057 (9th Cir. 2007).

8 The plaintiff bears the burden of satisfying the first two prongs of this specific jurisdiction  
 9 test. *Schwarzenegger*, 374 F.3d at 802. "If the plaintiff succeeds in satisfying both of the first  
 10 two prongs, the burden then shifts to the defendant to 'present a compelling case' that the  
 11 exercise of jurisdiction would not be reasonable." *Id.*

12 Purposeful availment is assessed by using the three-part effects test found in *Calder v.*  
 13 *Jones*, 465 U.S. 783 (1984); *see also, Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th  
 14 Cir. 2002) (describing *Calder* and the three-part effects test). This effects test states that the  
 15 defendant must have allegedly: "(1) committed an intentional act, (2) expressly aimed at the  
 16 forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum  
 17 state." *Schwarzenegger*, 374 F.3d at 803. All three parts of the test must be satisfied. *Id.*

18 Hayek contends both defendants, HCAL and HOC held themselves out as being  
 19 plaintiff's employer. (Opp. at 4.) According to plaintiff, both defendants therefore caused harm  
 20 within the state of California and "caused an effect within the State of California by ceasing to  
 21 pay [him]." (*Id.*) But in his declaration in opposition to defendants' motion, Hayek  
 22 acknowledges that he "was informed by the California Employment Development Department  
 23 that my true employer was HCAL, LLL . . . [and] HCAL, LLC now has admitted that they were  
 24 [sic] my employer during the time in question." (Hayek Declar. at ¶¶ 6, 7.)

25 Without the allegation that HOC was plaintiff's employer, Hayek has failed to set forth  
 26 any facts in his complaint that would suggest HOC committed an intentional act or aimed its  
 27 activities at California or caused harm that was likely to be suffered in California. None of the  
 28 three parts of the *Calder* effects test have been met here. Accordingly, the Court finds that

1 defendant HOC has not purposefully availed itself of the privilege of conducting activities  
2 within the forum state.

3 Because plaintiff has not demonstrated that the defendant HOC has purposefully availed  
4 itself of the privileges of conducting activities in California and plaintiff's claims do not arise out  
5 of defendant's forum related activities, the Court finds that plaintiff has failed to demonstrate  
6 that specific jurisdiction is present in this case over defendant HOC. As a result, HOC is  
7 dismissed from this action for lack of personal jurisdiction.

### 8 **B. Failure to State a Claim**

9 A plaintiff must "plead a short and plain statement of the claim showing that the pleader  
10 is entitled to relief." FED. R. CIV. P. 8(a)(2). This statement must be sufficient to "give the  
11 defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*  
12 *v. Gibson*, 355 U.S. 41, 47 (1957). Rule 12(b)(6) provides that a complaint may be dismissed for  
13 "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). A  
14 complaint may be dismissed as a matter of law if it lacks a cognizable legal theory or states  
15 insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749  
16 F.2d 530, 534 (9th Cir. 1984).

17 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond  
18 the complaint for additional facts, *e.g.*, facts presented in plaintiff's memorandum in opposition  
19 to a defendant's motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,  
20 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2  
21 MOORE'S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take  
22 into account additional facts asserted in a memorandum opposing the motion to dismiss, because  
23 such memoranda do not constitute pleadings under Rule 7(a).").

24 If a motion to dismiss is granted, the court must then decide whether to grant a plaintiff  
25 leave to amend. Rule 15(a) authorizes the court to freely grant leave to amend when there is no  
26 "undue delay, bad faith, or dilatory motive on the part of the movant." *Foman v. Davis*, 371 U.S.  
27 178, 182 (1962). Leave to amend is generally only denied when it is clear that the deficiencies of  
28 the complaint cannot possibly be cured by an amended version. *See DeSoto v. Yellow Freight*

1 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992); *Balistieri v. Pacifica Police Dept.*, 901 F.2d 696,  
 2 699 (9th Cir. 1990) (“A complaint should not be dismissed under Rule 12(b)(6) unless it appears  
 3 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would  
 4 entitle him to relief.”) (internal citations omitted).

5 Plaintiff, who is represented by counsel, contends that he has properly pleaded causes of  
 6 action for wrongful discharge under FEHA, constructive discharge, disability discrimination,  
 7 violation of the Americans with Disabilities Act (“ADA”), and intentional infliction of  
 8 emotional distress. A party’s pleading style is generally not at issue in a motion to dismiss. But  
 9 when the pleading reflects a jumble of legal causes of actions and theories that fails to give  
 10 defendants fair notice of what the plaintiff’s claims actually are and the grounds upon which they  
 11 rests, the complaint does not meet the standards of Rules 8 or 12.

12 Plaintiff’s complaint alleges two causes of action but within each cause of action are  
 13 multiple legal theories. For example, the first claim is set entitled:

14 FIRST CAUSE OF ACTION (WRONGFUL DISCHARGE) EMPLOYMENT  
 15 DISCRIMINATION IN VIOLATION OF PUBLIC POLICY, CALIFORNIA  
 CONSTITUTION ARTICLE 1, SECTION 8, AND THE FEHA.

16 (Comp. at 5.) Within this purported cause of action, plaintiff states that defendants  
 17 “discriminated against him on the basis of a condition of disability, medical condition, and age;  
 18 and did further discriminate against Plaintiff because he sought reasonable accommodation . . . .”  
 19 This section also includes a statement that defendants harassed plaintiff based on his age,  
 20 medical condition and disability which “forced Plaintiff to become anxious, nervous, and  
 21 depressed and resulted in Plaintiff’s constructive wrongful termination.” (*Id.*) Plaintiff states that  
 22 defendants failed to stop the harassment, “to investigate and learn the truth, and to apologize to  
 23 Plaintiff and reinstate Plaintiff to his existent position of employment.” (*Id.*) According to  
 24 plaintiff, he was replaced by a younger and less experience employee, was subjected to cruel and  
 25 unjust hardship in his employment, and defendants knew that “this conduct was unlawful and in  
 26 violation of California public policy.” Finally, in this same cause of action, plaintiff states that as  
 27 a result of defendants’ acts, he suffered humiliation, mental anguish, public ridicule, emotional  
 28 and physical distress. (*Id.*)

1 This grab bag of conclusory wrongdoings is not a cause of action to which defendants can  
2 respond in a meaningful manner. Plaintiff will be given an opportunity to amend the complaint  
3 to allege discrete causes of action that meet the pleading standards of Federal Rules of Civil  
4 Procedure 8 and 12. In other words, the factual allegations of the complaint must be "enough to  
5 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.  
6 1955, 1965 (2007). A plaintiff must plead more than conclusory allegations to show "plausible  
7 liability" and avoid dismissal. *Id.* at 1966 n. 5. The pleading standard of Rule 8 "demands more  
8 than an unadorned, the-defendant-unlawfully-harmed-me accusation" and a complaint does not  
9 suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v.*  
10 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 127 S. Ct. at 1966).

11 Plaintiff's second cause of action is labeled as a violation of the Americans with  
12 Disabilities Act. Defendants seek dismissal of the ADA claim because of plaintiff's failure to  
13 exhaust administrative remedies with the Equal Employment Opportunity Commission.

14 For claims brought under the ADA, an aggrieved individual must first exhaust his  
15 administrative remedies, which requires filing a charge with the EEOC detailing facts underlying  
16 the discrimination so that an investigation may begin. 42 U.S.C.A. § 2000e-5(b). An individual  
17 may bring a civil action against the employer on the matters contained in the charge within 90  
18 days after a Right to Sue Letter is issued by the EEOC. *Id.*

19 In his opposition, plaintiff does not address the issue of exhaustion with respect to his  
20 ADA claim. It therefore appears that plaintiff has abandoned his ADA claim and it will be  
21 dismissed. If plaintiff intends to amend his complaint to include an ADA claim, he must  
22 affirmatively allege that he has exhausted his ADA claim.

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1 **III. Conclusion**

2 Because the Court lacks personal jurisdiction over defendant HOC, its motion to dismiss  
3 is **GRANTED**. Defendants' motion to dismiss the complaint for failure to state a claim is  
4 **GRANTED**. Plaintiff is **GRANTED** leave to file an amended complaint in conformity with this  
5 Order. If plaintiff decides to file an amended complaint, he shall file the pleading on or before  
6 November 28, 2011.

7 **IT IS SO ORDERED.**

8 DATED: November 17, 2011

9   
10 M. James Lorenz  
United States District Court Judge

11 COPY TO:

12 HON. BARBARA L. MAJOR  
13 UNITED STATES MAGISTRATE JUDGE

14 ALL PARTIES/COUNSEL  
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